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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

JOHN DOE ONE; RICHARD ROE, in his capacity as executor for JOHN DOE TWO; JOHN DOE SIX; and JOHN DOE SEVEN; on behalf of themselves and all others similarly situated and for the benefit of the general public,

Plaintiffs,

v.

CVS PHARMACY, INC.; CAREMARK, L.L.C.; CAREMARK CALIFORNIA SPECIALTY PHARMACY, L.L.C.; GARFIELD BEACH CVS, L.L.C.; CAREMARKPCS HEALTH, L.L.C.; and DOES 1–10, inclusive,

Defendants.

Case No. 3:18-CV-1031-EMC

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE THIRD AMENDED COMPLAINT

Date: December 21, 2023
Time: 1:30 P.M. PST
Courtroom: 5, 17th Floor
Judge: Hon. Edward M. Chen

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STATEMENT OF ISSUES TO BE DECIDED

1. Whether Plaintiffs have sufficiently alleged, consistent with this Court's previous orders, that Defendants CVS Pharmacy, Inc., Caremark, L.L.C., Caremark California Specialty Pharmacy, L.L.C., Garfield Beach CVS, L.L.C., and CaremarkPCS Health, L.L.C. (collectively, "CVS") acted with deliberate indifference when CVS implemented the mandatory mail-order program for HIV medications ("Program") and subsequently failed to provide reasonable accommodations where Plaintiffs were denied meaningful access to the benefit CVS provides.

2. Whether the Third Amended Complaint adequately alleges proxy discrimination.

3. Whether the Third Amended Complaint adequately alleges claims for restitution under California's Unfair Competition Law ("UCL").

4. Whether John Doe One's, John Doe Six's, and John Doe Seven's claims for declaratory relief and injunctive relief present an actual case and controversy for Article III standing purposes.

5. Whether John Doe Seven was properly added as a Plaintiff to the Third Amended Complaint.

6. Whether Plaintiffs should be granted leave to amend the Third Amended Complaint if the Court finds additional allegations are needed.

INTRODUCTION

Plaintiffs and Class members are individuals living with HIV. Historically, individuals diagnosed with HIV have faced discrimination throughout the healthcare system. Section 1557 of the Affordable Care Act ("ACA"), 42 U.S.C. § 18116, is one of "[s]everal key provisions of the ACA" that "removed these barriers."[1]

John Does One through Five filed their initial complaint alleging, *inter alia*, disability discrimination under Section 1557. The Ninth Circuit held that Plaintiffs "adequately alleged that they were denied meaningful access to their prescription drug benefit, including medically appropriate dispensing of their medications and access to necessary counseling." *Doe v. CVS Pharmacy, Inc*., 982 F.3d 1204, 1211 (9th Cir. 2020). Since then, this Court has held that Plaintiffs have sufficiently alleged that Section 1557 applies to Defendants because they receive federal financial assistance. Dkt. No. 194.

This Court's July 28, 2023 order denied Defendants' fourth motion to dismiss and granted Plaintiffs' motion for leave to amend the complaint to add plaintiffs enrolled in the Program who have standing to seek an injunction ("Order"). Dkt. No. 203. In the Third Amended Complaint ("TAC"), filed on September 11, 2023, Plaintiffs added John Doe Six, whose status in the Program remains uncertain due to CVS's failure to provide timely, accurate, and adequate notice, and John Doe Seven, who currently must obtain his HIV medications through the Program. Dkt. No. 241.[2]

Plaintiffs seek compensatory damages, equitable monetary relief, and appropriate injunctive relief. John Does Six and Seven also seek prospective injunctive relief to allow individuals with HIV to access the same prescription drug benefits other enrollees receive and adequate notice of their rights and options under the Program.

LEGAL STANDARD

Rule 8's pleading standards require only "'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim

[1] Jennifer Kates & Lindsey Dawson, *Insurance Coverage Changes for People with HIV Under the ACA*, Kaiser Fam. Found. (Feb. 14, 2017), https://tinyurl.com/ye5yu6pw.

[2] During the pendency of the action, John Does Two, Three, and Four passed away, and John Doe One is no longer enrolled in the Program. John Doe Two remains in the case and is represented by his estate. John Does Three and Four were voluntarily dismissed after their deaths, and John Doe Five was dismissed pursuant to stipulation by the Parties.

is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In doing so, a party must allege "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). To allege Article III injury, a plaintiff "need not demonstrate that there is a guarantee that [their] injuries will be redressed by a favorable decision; rather, a plaintiff need only show a substantial likelihood that the relief sought would redress the injury." *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018). And relevant to this motion, "[t]he pleading is construed in the light most favorable to the non-moving party and all material allegations in it are taken to be true." *Sanders v. Kennedy*, 749 F.2d 478, 481 (9th Cir. 1986).

ARGUMENT

I. Plaintiffs' Complaint States a Claim for Deliberate Indifference Under Section 1557

The intentional discrimination requirement of Section 1557 is met when a covered entity "intentionally or with deliberate indifference fails to provide meaningful access or reasonable accommodation to disabled persons." *Mark H. v. Lemahieu*, 513 F.3d 922, 938 (9th Cir. 2008). Even the cases relied on by Defendants hold that, to establish a defendant's deliberate indifference under Section 1557, "a plaintiff must show that [1] the defendant 'knew that harm to a federally protected right was substantially likely' and [2] 'failed to act on that likelihood.'" *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1139 (9th Cir. 2001).[3] Under this standard, to state a damages claim for intentional discrimination, Plaintiffs can allege, as they do in the TAC at ¶¶ 132–63, that CVS knew there was a substantial likelihood that restrictions under the Program would deny Plaintiffs an "equal opportunity to obtain the same result [and] gain the same benefit" from the prescription drug coverage as people without disabilities. *See Alexander v. Choate*, 469 U.S. 287, 305 (1985) (quoting 45 C.F.R. § 84.4(b)(2)). Yet CVS made the deliberate choice to plow ahead with the Program and deny reasonable accommodations to Plaintiffs as a matter of internal policy or

[3] Neither ill will nor malice is required under the deliberate indifference standard. *See Barber ex rel. Barber v. Colo. Dep't of Revenue*, 562 F.3d 1222, 1228 (10th Cir. 2009); *accord Lovell v. Chandler*, 303 F.3d 1039, 1057 (9th Cir. 2002) ("the purpose of requiring proof of intent as a prerequisite for the recovery of monetary damages . . . is to ensure that the entity had knowledge and notice . . . . not to measure the degree of institutional ill will toward a protected group, or to weigh competing institutional motives.").

practice. TAC at ¶¶ 132–63. Simply put, CVS was on notice of its obligations under Section 1557 yet failed to provide an equal opportunity to access its programs or services. *See City of Canton v. Harris*, 489 U.S. 378, 389 (1988) (O'Connor, J., concurring) (stating that deliberate indifference requires both "some form of notice . . . and the opportunity to conform to [statutory] dictates."); *Duvall*, 260 F.3d at 1139 (citing *Harris*, 489 U.S. at 389). Plaintiffs' allegations adequately state a claim of deliberate indifference and are sufficient for the Court to deny this Motion.

A. Defendants Misstate the Deliberate Indifference Standard and Misapply It to Plaintiffs' Allegations of Intentional Discrimination

As they have before, Defendants argue Plaintiffs' Section 1557 claims for compensatory damages must be dismissed because Plaintiffs do not allege CVS acted with deliberate indifference when violating their rights. A motion to dismiss is often an inappropriate vehicle for an inquiry into deliberate indifference, *see Button v. Bd. of Regents of Univ. & Cmty. Coll. Sys. of Nev.*, 289 F. App'x 964, 968 (9th Cir. 2008). CVS's motion is a prime example of this admonition, based mostly on counterfactual merits arguments inappropriate at this stage of the proceeding.[4]

CVS misstates the deliberate indifference standard by equating the "substantially likely" prong with *actual knowledge* that a defendant's actions will violate a plaintiff's rights under the ACA. Contrary to *Duvall* and the line of cases on which it relies, CVS argues that Plaintiffs' allegations fail to meet the deliberate indifference standard because the TAC does not allege that "at the time Plaintiffs sued, [a] court had held that requiring members to receive HIV/AIDS medications . . . via mail-order or drop shipment violated federal law." Motion at 6–7. CVS does not cite a single Section 1557 or Section 504 case holding that, as a matter of law, a defendant lacks knowledge of a substantial likelihood of harm from its conduct absent a prior court decision, and no court has ever imposed such a standard. Rather, CVS reaches this erroneous conclusion by inappropriately analogizing liability under the ACA (and by extension the Rehabilitation Act) to the requirements for a qualified immunity defense under Section 1983. *Compare* Motion at 7 (suggesting, incorrectly, that "there is no federal authority holding that . . . a PBM must alter the

[4] Motion at 10 (asserting that "Unlike a PBM, a pharmacy has no involvement in administering a prescription benefit"); *id.* at 11–12 ("health insurers . . . control the benefit designs offered to members, [while] PBMs and pharmacies . . . do not"); *id.* at 13 ("'CVS Caremark' lacks authority to allow [members] to opt-out—that is a decision controlled by the health plan"). These assertions contradict the allegations of the TAC, at ¶ 2.

terms of its client's benefit plan" in response to "an individual patient's request for" a reasonable accommodation), *with Jackson v. Cal. Dep't of Corr. & Rehab.*, 510 F. App'x 599, 601 (9th Cir. 2013) (qualified immunity protects government officials from liability if their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known"). The deliberate indifference standard, unlike qualified immunity, contains no "settled law" requirement. *See generally A.V. through Hanson v. Douglas Cnty. Sch. Dist. RE-1*, 586 F. Supp. 3d 1053, 1066 n.5 (D. Colo. 2022) ("Although the [] Defendants attempt to import a 'clearly established law' analysis into the deliberate indifference standard under the ADA, they cite no law supporting their proposition. Nor is the Court aware of any such law.").[5]

Nor is there any requirement that Plaintiffs call to CVS's attention any particular sections of the ACA or explicitly tell Defendants that their rights were violated. Rather, under the deliberate indifference standard, the relevant knowledge that CVS must possess concerns the facts constituting the *discriminatory conduct*—not knowledge that those facts give rise to a violation of the law. In *Lovell v. Chandler*, 303 F.3d at 1057, the Ninth Circuit held that by categorically excluding the plaintiffs from a benefit because of their disability, as Plaintiffs allege that CVS does here (TAC, ¶¶ 141–63), defendant "had knowledge of its own facially discriminatory conduct and notice of the effects of its conduct" on the plaintiffs. And because the defendant is "chargeable with notice that federal rights are implicated by such discrimination," the defendant also "had notice a modification was required." *Id.* Similarly, in the Title IX context, the Supreme Court has explained the deliberate indifference standard does not require a defendant to subjectively understand a violation of a federally protected right is likely. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998). This standard requires only that Plaintiffs allege CVS possessed "information" that was *objectively* sufficient to "alert" it about the alleged violation. *See id.* at 291.

[5] Even then, in the Section 1983 context, a defendant has notice its conduct violates a federal right even absent "a case directly on point," where existing precedent has "placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). Here, it is "beyond debate" that a defendant must provide a disabled person a reasonable accommodation to assure meaningful access to the program or benefit provided, *see Choate*, 469 U.S. at 305, and a defendant "can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

There is no support under either Ninth Circuit or Supreme Court precedent for CVS's attempt to import the qualified immunity standard or an "actual notice" requirement into the ACA where a plaintiff seeks compensatory damages. Plaintiffs' interpretation of the deliberate indifference standard is consistent with both the Rehabilitation Act's and ACA's broad remedial purposes. In *Choate*, the Supreme Court observed that, in passing the Rehabilitation Act, Congress perceived discrimination against individuals with disabilities "to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect." 469 U.S. at 295; *cf. Petties v. Carter*, 836 F.3d 722, 728 (7th Cir. 2016) ("[E]xcept in the most egregious cases, plaintiffs generally lack direct evidence of actual knowledge. Rarely, if ever, will an official say, 'I knew this would probably harm you, but I did it anyway.'").

B. Plaintiffs Allege That CVS Was on Notice That Harm to Plaintiffs' Rights Under the ACA Was "Substantially Likely," and CVS Made the Deliberate Choice to Not Act on That Likelihood

As the Court advised, Plaintiffs have alleged that serious and pervasive warning flags put CVS on notice that "harm to a federally protected right was substantially likely," and that CVS nevertheless failed to act accordingly. TAC, ¶¶ 141–63. By mandating that all persons living with HIV obtain their medications subject to the Program, which denied them meaningful access to their prescription drug benefit, CVS had knowledge of its own facially discriminatory conduct and notice of the effects of its conduct on Plaintiffs and Class members. In so discriminating, and in failing to alleviate the impact of this discrimination on individuals who remained subject to the limitations and exclusions under the Program, CVS acted with at least deliberate indifference. *Id.* at ¶¶ 141–63; *see Lovell*, 303 F.3d at 1057–58.

1. Plaintiffs' Numerous Complaints and Defendants' Inaction

Plaintiffs allege that they repeatedly complained to CVS and made multiple requests for reasonable accommodations in every manner CVS made available to them. *E.g.*, TAC, ¶¶ 23–24, 28 (John Doe One); 36, 41–49 (John Doe Two); 56–57, 69–70 (John Doe Six); 96 (John Doe Seven). These complaints made CVS staff aware that Plaintiffs had real and imminent concerns that under the Program they would not have access, in a meaningful and medically appropriate way, to their HIV medications and to necessary counseling from pharmacists. *E.g.*, *id.* at ¶¶ 24

(CVS representative directed John Doe One to contact CVS Caremark's Specialty Pharmacy about his complaints), 42 (CVS representative told John Doe Two she would help him appeal the denial of his reasonable accommodation request), 44 (another CVS representative was unaware of any internal procedure for submitting formal complaints concerning access to medications). John Doe One even "explicitly notified Defendants' representative by [] email that he believed this limitation on access to his HIV medications and the denial of his opt-out requests were unlawful." *Id.* at ¶ 24.

Prior complaints made by the same plaintiffs have been found to provide notice sufficient to impose liability. *See Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 276 (2d Cir. 2009) (jury could find the requisite knowledge for deliberate indifference where the plaintiffs made repeated attempts before and after surgery to secure an ASL interpreter from the hospital); *see also Doe v. Green*, 298 F. Supp. 2d 1025, 1033–34 (D. Nev. 2004) (collecting cases). Here, Plaintiffs' multiple complaints provided CVS with notice, and Defendants cannot dispute Plaintiffs submitted them. *See S.D. by & through Brown v. Moreland Sch. Dist.*, No. 5:14-CV-00813-LHK, 2014 WL 3772606, at *4 (N.D. Cal. July 29, 2014) (defendant was on sufficient notice where (a) its own observations and (b) the plaintiff's parents' notification plausibly alerted the defendant that the plaintiff was being denied an education equal to their nondisabled peers); *see also Patricia N. v. Lemahieu*, 141 F. Supp. 2d 1243, 1255 (D. Haw. 2001) (denying motion to dismiss where plaintiffs alleged they "repeatedly complained" of not receiving certain services necessary to gain the same benefit as nondisabled public school students); *Durham v. Kelley*, 82 F.4th 217, 226 (3d Cir. 2023) (The plaintiff "made numerous prison officials aware that he had a cane, needed a cane to walk, and was in severe pain without it. Despite this, he was continuously denied his cane and shower accommodations. This alone was sufficient to allege a deliberate indifference claim.").

The inaction by CVS in the face of Plaintiffs' complaints, as a matter of internal policy or practice, is sufficient to allege a deliberate indifference claim. *See Updike v. Multnomah Cnty.*, 870 F.3d 939, 951 (9th Cir. 2017) ("A [covered] entity may not disregard the plight and distress of a disabled individual."). As the Second Circuit noted, even an "apathetic response" can satisfy the standard because a defendant's "indifference to [a plaintiff's] rights may . . . be[] so pervasive as to amount to a choice." *Loeffler*, 582 F.3d at 277. CVS's intentional discrimination can also be

1 "inferred from" its "deliberate indifference to the strong likelihood that pursuit of its questioned
2 policies will likely result in a violation of federally protected rights." *Meagley v. City of Little*
3 *Rock*, 639 F.3d 384, 389 (8th Cir. 2011); *accord Duvall*, 260 F.3d at 1138–39 & n.13. The Ninth
4 Circuit, in the context of an Eight Amendment deliberate indifference claim, has already concluded
5 that medically inappropriate medication protocols may constitute deliberate indifference. *See*
6 *Hutchinson v. United States*, 838 F.2d 390, 394 (9th Cir. 1988) (officials may be deliberately
7 indifferent if they "deny, delay or intentionally interfere with medical treatment," or if the method
8 by which they provide care is inadequate). The TAC at ¶¶ 141–50, 155–63 further alleges in detail
9 how CVS has a culture of minimizing and ignoring problems that individuals living with HIV
10 experience because of the Program.

11 **2. CVS's Policy of Denying Accommodation Requests**

12 Plaintiffs allege that, as a matter of internal policy or practice, they were continuously
13 denied "opt out" accommodations or any other type of accommodation that would have assured
14 meaningful access to the benefit CVS provides to other enrollees. TAC, ¶¶ 28, 41–42, 46, 48–49,
15 57, 69, 96. CVS does not dispute that Plaintiffs' multiple known diagnoses—*i.e.*, cancer,
16 congestive heart failure, depression, diabetes, HIV infection, and kidney failure—meet the notice
17 requirements. *Id.*, ¶¶ 20, 27, 32, 50, 51, 72; *see Douglas v. City of Los Angeles*, No. 2:20-cv-07439-
18 MEMF-PD, 2023 WL 6528725, at *3, 13 (C.D. Cal. Oct. 3, 2023) (Notice requirement met where
19 plaintiff asked police officers to "leave because Officers were 'exacerbating [his] disability,' and
20 that the Officers were aware that he had a disability," because of "a disabled placard on the kitchen
21 counter.").

22 In *Duvall*, the Ninth Circuit held that, (1) "[w]hen the plaintiff has alerted the public entity
23 to his need for accommodation, [2] where the need for accommodation is obvious, or [3] required
24 by statute or regulation, the [defendant] is on notice that an accommodation is required, and the
25 plaintiff has satisfied the first element of the deliberate indifference test." 260 F.3d at 1139
26 (cleaned up). Once on notice, CVS was "required to undertake a fact-specific investigation to
27 determine what constitutes a reasonable accommodation," which CVS failed to do. *Id.*; *see also*
28 *Updike*, 870 F.3d at 954 ("It is well-settled that Title II and § 504 create a duty to gather sufficient

information from the [disabled individual] and qualified experts as needed to determine what accommodations are necessary."). Even a minimal "fact-specific investigation" would have informed CVS of the legitimate need for a reasonable accommodation. *Duvall*, 260 F.3d at 1139; *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1089 (9th Cir. 2002). Plaintiffs allege that as a matter of internal policy or practice, Defendants' front-line staff and their supervisors, who are responsible for interfacing with Plaintiffs and similarly situated disabled individuals regarding their HIV medications, did not investigate the reasons behind Plaintiffs' requests to opt out of the Program, and therefore did not ascertain whether those requests were disability-related and, in fact, reasonable. *See Updike*, 870 F.3d at 958 (finding fact issues where a covered entity was "deliberately indifferent . . . when it did not conduct an informed assessment of [the deaf individual's] accommodation needs"); *see also Pierce v. Dist. of Columbia*, 128 F. Supp. 250, 268 (D.D.C. 2015) ("[T]his Court holds that the failure of prison staff to conduct an informed assessment of the abilities and accommodation needs of a new inmate who is obviously disabled is intentional discrimination in the form of deliberate indifference.").

CVS's uniform treatment of all enrollees subject to the Program contravenes Section 1557's (and Section 504's) requirement to equitably treat enrollees with disabilities.[6] According to counsel for Defendants at the hearing on their fourth motion to dismiss, there is no mechanism for Plaintiffs or other similarly disabled individuals to request an accommodation through CVS. Transcript of June 22, 2023 Hearing ("Transcript") at 42:5–43:9; 54:14–19; 65:10–17.[7] CVS's design of its prescription drug benefit in such a way is further evidence of deliberate action by CVS. *See generally Perez v. Fenoglio*, 792 F.3d 768, 782 (7th Cir. 2015) (accommodation request "that fall[s] on 'deaf ears' may evidence deliberate indifference"). Moreover, although CVS chides Plaintiffs (Motion at 9–10) for not explicitly disclosing in their initial reasonable accommodation request that they have been diagnosed with HIV (a bizarre position to take given that Plaintiffs

[6] John Doe Seven has still not received a response from CVS concerning his accommodation requests, TAC, ¶ 96, which further demonstrates CVS's deliberate indifference. *See Karasek v. Regents of Univ. of Cal.*, 956 F.3d 1093, 1106 (9th Cir. 2020) ("Delayed response constitutes deliberate indifference if it prejudices the plaintiff or if the delay was a deliberate attempt to sabotage [the plaintiff's] complaint or its orderly resolution.").

[7] A true and correct copy of the Transcript is attached as Exhibit A to the Declaration of Daniel L. Sternberg ("Sternberg Decl.").

sought access to HIV medications), Plaintiffs were "not required to use any particular language when requesting an accommodation but need only 'inform the [covered entity] of the need for an adjustment due to a medical condition.'" *Zivkovic*, 302 F.3d at 1089; *accord Kowitz v. Trinity Health*, 839 F.3d 742, 749 (8th Cir. 2016) ("There is no requirement to use magic words like 'reasonable accommodation.'"). "Plain English will suffice." *Shaikh v. Texas A&M Univ. Coll. of Med.*, 739 F. App'x 215, 221 n.7 (5th Cir. 2018). Through their "opt-out" requests, submitted multiple times orally and in writing, Plaintiffs allege they made accommodation requests to CVS in "plain English." TAC, ¶¶ 28, 41–42, 46, 48–49, 57, 69, 96.[8] CVS asserts that "Plaintiffs do not allege that Defendants have given other individuals . . . the accommodation they allegedly denied to Plaintiffs." Motion at 15. This argument is irrelevant to whether Plaintiffs are entitled under Section 1557 to seek an accommodation. Even if CVS "had the best of intentions, and . . . believed themselves to be within the confines of the law, they nevertheless intentionally violated the [ACA] by willfully withholding from plaintiff[s] the reasonable accommodations to which [they were] entitled under the law." *Proctor v. Prince George's Hosp. Ctr.*, 32 F. Supp. 2d 820, 829 (D. Md. 1998) (quoting *Bartlett v. N.Y. State Bd. of Law Exam'rs*, 156 F.3d 321 (2d Cir. 1998)).

3. CVS Decision-Makers Were Aware of These Access Issues

CVS personnel possessed information that the Program prevented Plaintiffs and other Class members from receiving effective treatment for their condition, including medically appropriate dispensing of their medications and access to necessary counseling, and the Program would negatively affect their equal access to their prescription drug benefits. *See*, *e.g.*, TAC, ¶¶ 154–63. CVS's own medical studies and surveys made clear "that the design of the Program was suboptimal for HIV/AIDS Medications and likely discriminatory against people living with HIV." *Id.* at ¶ 156; *see also id.*, ¶¶ 157 (CVS internal study concluded "that consumers should be provided a blended approach as mail order only programs had a negative effect on the rate of individuals taking these medications every day and exactly as prescribed"); 161 (CVS patient data from 2017 "identified many of the same access issues Plaintiffs have encountered as endemic to

[8] Under the terms of their health plans, Plaintiffs' initial accommodation requests are filed with the employer plan sponsor. Under CVS's view of the world, a plaintiff could only seek an accommodation from CVS by first disclosing their HIV status to their employer, an unreasonable request given the stigma that sadly still surrounds HIV.

1 the Program—such as missed dosages of HIV/AIDS Medications because of delivery delays;
2 orders cancelled without notifying members; and other shipping issues resulting in members not
3 receiving their HIV/AIDS Medications.”).

4 Defendants demonstrate deliberate indifference “when they have notice of the potential
5 risk of their decision, and clearly refuse the accommodation knowingly.” *Adams v. Montgomery*
6 *Coll. (Rockville)*, 834 F. Supp. 2d 386, 394 (D. Md. 2011) (grounding deliberate indifference
7 analysis in *Mark H.*, 513 F.3d at 938). Thus, the TAC adequately alleges that, as a matter of internal
8 policy or practice, Defendants refused to provide appropriate accommodations for Plaintiffs'
9 disability where necessary to assure meaningful access despite (a) CVS's own studies and survey
10 data clearly indicating that a mandatory mail-order requirement would lead to medically
11 inappropriate dispensing of HIV medications and limiting access to necessary counseling from
12 pharmacists, (b) significant and widespread media coverage and litigation against other mandatory
13 mail-order programs, and (c) negotiations between Plaintiffs' counsel and high-level members of
14 CVS concerning the Program.

15 **4. Media Coverage and Litigation Against Other Mail-Order Programs**

16 In the TAC, Plaintiffs have cited over 30 articles and six lawsuits addressing nearly
17 identical issues individuals living with HIV face due to mandatory mail-order delivery of HIV
18 medications, including an article by *The New York Times* about a similar lawsuit against Aetna,
19 CVS's own wholly owned subsidiary. TAC, ¶¶ 151–53.[9] All the litigation and news coverage
20 described in the TAC occurred *before the filing of this case.* In one of the cases Plaintiffs cite
21 against Aetna's subsidiary Coventry (which is now a subsidiary of CVS), *Doe v. Coventry Health*
22 *Care, Inc.*, No. 15-CIV-62685 (S.D. Fla. May 5, 2016),[10] the court denied a motion to dismiss an
23 ACA claim on the basis of allegations nearly identical to the ones here. *Compare id.* at 15–17
24 (denying motion to dismiss ACA claim where “Plaintiff claims he, along with all other persons
25 prescribed HIV medications and subject to the mail-order program, is denied meaningful access

26 [9] The lawsuit against Aetna was settled in February 2017, just eight months before CVS agreed to
buy Aetna. Carolyn Y. Johnson, *CVS agrees to buy Aetna in $69 billion deal that could shake up*
27 *health care industry*, Washington Post (Dec. 3, 2017), https://tinyurl.com/y7jtw6hm. CVS cannot
in good faith claim it was unaware of this litigation.
28 [10] Attached as Exhibit B to the Sternberg Declaration is the decision in *Doe v. Coventry Health*
Care, Inc.

to the drugs") *with CVS Pharmacy, Inc.*, 982 F.3d at 1211 (holding that Plaintiffs "adequately alleged that they were denied meaningful access to their prescription drug benefit, including medically appropriate dispensing of their medications and access to necessary counseling.") The *Coventry* ruling occurred three years earlier than the filing of this case. And as CVS (incorrectly) claims is required to give notice under the deliberate indifference standard, this is a decision where a "court had held that requiring members to receive HIV/AIDS medications . . . via mail-order or drop shipment violated federal law." All this media coverage, combined with the associated litigation, is sufficient to allege CVS had notice from both news stories and other litigation that designing a prescription drug benefit that made HIV medications subject to mandatory mail-order delivery could deny people living with HIV from obtaining equal access to the prescription drug benefit CVS provides. *See* Dkt. No. 230 at 11 ("articles are probative of Defendants' knowledge"); *see generally A.V. through Hanson*, 586 F. Supp. 3d at 1068 (denying motion to dismiss where plaintiff cited statistics and news stories to show defendants were on notice that they were failing to adequately train their employees, and thus were liable under Section 504).

5. The Parties' Pre-Lawsuit Negotiations

Plaintiffs also allege that, "During the parties' negotiations over the course of 18 months, Plaintiffs' counsel thoroughly raised with both Defendants' counsel and high-level members of Defendants' entities the health and privacy issues that Plaintiffs and other individuals living with HIV experienced under the Program." TAC, ¶ 154. The Court has already concluded these types of discussions "could state a plausible claim of Defendants' knowledge." Dkt. No. 230 at 12.

C. Defendants' "Failure to Act" Arguments Are Meritless

CVS raises three erroneous arguments regarding the "failure to act" prong of the deliberate indifference standard. First, CVS argues that Plaintiffs fail to allege any of the Defendants had the "contractual authority" to make changes to Plaintiffs' health plans. Motion at 13. In fact, Plaintiffs allege CVS implemented the Program by "utiliz[ing] its discretion" under its contracts with employers and "offer[ing] financial inducements to plan sponsors." TAC, ¶ 2. "As such, CVS effectively controls and directs the pharmacy benefits of such plans. Furthermore . . . CVS Caremark has an ongoing ability to alter plan terms and the prescription drug benefits provided

thereunder to Class Members, yet CVS Caremark has taken no corrective action to ensure Plaintiffs have meaningful access to the prescription drug benefits offered." *Id.* CVS's assertions contrary to these factual allegations (*see* Declaration of J. Ramón Vickman ISO Defendants' Motion to Dismiss the TAC, ¶¶ 4–5; Transcript, 53:10–55:12) are both improper and objectionable under Rule 12(d) and cannot properly be considered. They are also unpersuasive. *See Martinez v. Cnty. of Alameda*, 512 F. Supp. 3d 978, 987 (N.D. Cal. 2021) (rejecting as "merely speculative and conclusory" the defendants' assertions, at the motion-to-dismiss stage, that the plaintiff's requested accommodation "was not feasible"). These arguments should not be allowed on a Rule 12(b)(6) challenge, as they are not related to Plaintiffs' Article III standing for injunctive relief. To the extent the Court considers CVS's counterfactual arguments, those arguments conflict with 45 C.F.R. § 84.4(b)(4)(i)–(ii) as well as the reality of CVS's contracts, pursuant to which CVS reserves the right to alter pharmacy benefits at any time. *See* Sternberg Decl., ¶¶ 4–9.[11]

Second, rather than being a defense to liability, Defendants' creation of the HIV Open prescription drug benefit design (TAC, ¶ 158; Motion at 14), which supposedly carves out HIV medications from the Program, shows high-level corporate knowledge about the access problems caused by mandatory mail order for HIV medications. Instead of establishing a procedure for providing reasonable accommodations to the end users—the members living with HIV who are denied meaningful access to the benefit CVS provides—the corporate decision by CVS was to actually provide an accommodation to the employer-plan sponsors. *See*, *e.g.*, TAC, ¶ 151 (detailing numerous federal court cases involving disability discrimination claims arising from mail-order delivery of HIV medications). This is not the kind of action in response to knowledge of the discriminatory effects of the Program that can shield CVS from liability as a matter of law.

[11] CVS's argument (Motion at 8) that it "lack[s] authority" under its contracts with its clients to end the discriminatory conduct at issue here, because "that is a decision controlled by the health plan[s]," cannot be squared with 45 C.F.R. § 84.4(b)(4), which provides that a "recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration" that discriminate on the basis of disability. *See Tovar v. Essentia Health*, 857 F.3d 771, 778 (8th Cir. 2017) (third party administrators like the PBM defendants here can be liable under Section 1557 based on discriminatory terms in a self-funded plan "notwithstanding the fact that [the employer plan sponsor] subsequently adopted the plan and maintained control over its terms"); *cf.*, *C.P. by and through Pritchard v. Blue Cross Blue Shield of Ill.*, No. 3:20-cv-06145-RJB, 2022 WL 17788148, *9 (W.D. Wash 2022) ("ERISA specifically provides that its requirements are not to be construed to invalidate or impair laws like Section 1557 and so ERISA's requirement that Blue Cross follow the Exclusion's language is no defense.").

Such conduct by CVS goes well beyond that which "may be attributable to bureaucratic slippage that constitutes negligence rather than deliberate action or inaction." *See Duvall*, 260 F.3d at 1139–40. Appropriate accommodations must be directed to the person discriminated against, not third parties. No case cited by CVS stands for the proposition that giving a voluntary, non-binding accommodation to a third party is sufficient to satisfy CVS's obligation to accommodate Plaintiffs' disability where necessary "to assure meaningful access" in the "program or benefit" offered. *See Choate*, 469 U.S. at 301.

Under CVS's view of the world, companies carrying out discriminatory practices could avoid liability under anti-discrimination statutes altogether by simply offering voluntary, non-binding accommodations to third parties. This argument conflicts with both Ninth Circuit and Supreme Court precedent concerning CVS's obligation to assure meaningful access to the benefit provided. Moreover, given that CVS offers "financial inducements" to employers to encourage them to select health plans subject to the discriminatory Program (TAC, ¶ 2)—*i.e.*, to forgo the so-called HIV Open plan—this alternative to the Program is nothing more than a cynical acknowledgement by CVS of the discriminatory effect of the Program on people living with HIV, as Plaintiffs allege. *Id.*, ¶ 158; *see also Button*, 289 F. App'x at 968 ("It is not enough that the Board took some action—in *Duvall* the [defendant] court made some effort to accommodate, but we held that a jury could find this effort both insufficient and deliberate").

The cases cited by CVS do not compel a different result. *T.B. ex rel. Brenneise v. San Diego Unified Sch. Dist.*, 806 F.3d 451 (9th Cir. 2015) addressed the plaintiffs' appeal of a grant of summary judgement; *Sarfaty v. City of Los Angeles*, 2020 WL 4697906 (C.D. Cal. Aug. 12, 2020), involved findings of fact and conclusions of law following a bench trial. These are inapplicable to whether at the motion-to-dismiss stage Plaintiffs adequately allege CVS's liability.

D. CVS Has a Clear Legal Obligation to Provide Reasonable Accommodations

CVS's argument (Motion at 7–8) that they lacked knowledge that harm to Plaintiffs' rights was substantially likely because no statute or regulation "required Defendants to provide Plaintiffs" a reasonable accommodation is wrong. Covered entities, including entities like CVS, have an affirmative obligation under Section 1557 to ensure that "an individual shall not . . . be

excluded from participation in, be denied the benefits of, or be subjected to discrimination under" any health program receiving federal financial assistance "on the ground prohibited by" Section 504 of the Rehabilitation Act of 1973. 42 U.S.C. § 18116(a); *see Updike*, 870 F.3d at 949.[12] This obligation imposed upon recipients of federal financial assistance includes the duty to affirmatively accommodate the individual's disability where necessary "to assure meaningful access" in the "program or benefit" offered by defendants. *See Choate*, 469 U.S. at 301; 28 C.F.R. § 41.53; 45 C.F.R. § 84.12. Moreover, "when an entity accepts funding from the federal government, it does so in exchange for a promise not to discriminate against third-party users of its services." *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1204 (11th Cir. 2007); *see also* TAC, ¶ 212 ("CVS Health Corporation explicitly acknowledges that Defendant CVS Pharmacy, Inc. is subject to section 1557 of the ACA").

HHS regulations further clarify CVS's obligations under Section 1557. Healthcare providers like CVS "may not, directly or through contractual or other arrangements utilize criteria or methods of administration" that either (i) "have the effect of subjecting [people with disabilities] to discrimination;" or (ii) "have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program or activity with respect to" people with disabilities. 45 C.F.R. § 84.4(b)(4)(i)–(ii). Moreover, 45 C.F.R. § 156.122(e) requires a "health plan [to] allow enrollees to access prescription drug benefits at in-network retail pharmacies, unless" the drug is subject to certain conditions that do not apply here to Plaintiffs' HIV medications. According to HHS, "making drugs available only by mail-order could discourage enrollment by, and thus discriminate against . . . individuals who have conditions that they wish to keep confidential." Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2016, 80 Fed. Reg. 39, 10820–22 (Feb. 27, 2015). This "provision is important to ensure uniformity in benefit design and consumer choice." *Id.*

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[12] The ACA also bars discriminatory practices such as benefit designs that have the effect of excluding or denying access to health care services because of a person's disability. *See*, *e.g.*, 42 U.S.C. §§ 300gg, 300gg-1, 300gg-2. These protections extend to group health plans, which include self-insured plans such as those Plaintiffs are or were enrolled in. *Id.* at §§ 300gg-3, 300gg-4.

Decades of Congressional and regulatory action aimed at eliminating disability discrimination of the exact kind alleged by Plaintiffs—that arising from "thoughtlessness and indifference . . . benign neglect," *Choate*, 469 U.S. at 295—are also sufficient to establish CVS had notice of its obligations under Section 1557 to affirmatively accommodate Plaintiffs' disability where necessary "to assure meaningful access" in the "program or benefit" offered by defendants. *See id.* at 301. HHS regulations prohibit CVS from providing an individual with a disability "an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others" or "that is not as effective as that provided to others." 45 C.F.R. § 84.4(b)(1)(ii)–(iii). In addition, covered healthcare providers shall not "[p]rovide benefits or services in a manner that limits or has the effect of limiting the participation of" people with disabilities. *Id.* at § 84.52(a)(4); *see also id.* at § 84.52(a)(2) (Covered entities are prohibited from affording people with disabilities "an opportunity to receive benefits or services that is not equal to that offered" to others). And 45 C.F.R. § 84.7 requires CVS to "designate at least one person to coordinate its efforts to comply" with the non-discrimination requirements under Section 504 and to "adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by" Section 504.

CVS's position not only fails to find any support in Ninth Circuit caselaw, but also ignores that "Congress, the Supreme Court, and this circuit have recognized that discrimination against men and women with disabilities often results from thoughtlessness or a reluctance to employ the required resources to ensure accessibility, rather than from animus." *Ferguson v. City of Phoenix*, 157 F.3d 668, 679 (9th Cir. 1998) (Tashima, J., dissenting). In fact, "that an accommodation was legally required by statute or regulation serves as an independent basis to establish notice . . . whether the need for accommodation was obvious is a separate factual inquiry." *A.G. v. Paradise Valley Unified Sch. Dist. No. 69*, 815 F.3d 1195, 1207–08 (9th Cir. 2016).

CVS is thus wrong to say (Motion at 8) that, contrary to Plaintiffs' allegations, "[g]iven the weight of authority at the time Plaintiffs asked to 'opt out' of the" Program, and "[g]iven the state of the law" at this time, "Defendants could not have known it was substantially likely that denying their requests would violate Plaintiffs' federal rights." *Cf. Ferguson*, 157 F.3d 679

(“Ignorance [of the law] should not excuse liability for compensatory damages that result” from a defendant’s violation of Section 1557). The issue is not whether individual employees at CVS were deliberately indifferent to Plaintiffs’ rights under the ACA. The issue is whether CVS as corporate entities were aware of their obligations to individuals with disabilities, and still failed to ensure that Plaintiffs had an equal opportunity to access its programs and services. *See* Dkt. No. 203 at 10 (“the doctrine of *respondeat superior* is applicable to claims based on § 504 . . . . Thus, notice to claims representatives would be imputed to decisionmakers.”) (internal quotation and citation omitted); *see also Duvall*, 260 F.3d at 1141.

II. Plaintiffs Adequately Allege a Claim of Proxy Discrimination

Proxy discrimination—another form of intentional discrimination for which compensatory damages are available—is shown where a “defendant enacts a . . . policy that treats individuals differently on the basis of seemingly neutral criteria that are so closely associated with [a] disfavored group that discrimination on the basis of such criteria is, constructively, facial discrimination against the disfavored group.” *Pac. Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142, 1160 n.23 (9th Cir. 2013). “For example, discriminating against individuals with gray hair is a proxy for age discrimination because the ‘fit’ between age and gray hair is sufficiently close.” *Id.* CVS argues (Motion at 16) that “[t]here simply is no ‘fit’ between a patient receiving a specialty medication and a patient suffering from HIV/AIDS”, but this assertion mischaracterizes Plaintiffs’ theory of proxy discrimination. The relevant policy here is designating all HIV medications as specialty medications and therefore subject to the Program. The “seemingly neutral criteri[on]” is the receipt of HIV medications by Plaintiffs and the class. Lastly, the “fit” between individuals receiving HIV medications and individuals diagnosed with HIV (a recognized disability) is one-to-one. Discriminating against Plaintiffs because they are prescribed HIV medications “is a proxy for” discrimination against them on the basis of their HIV disability.

In *Fuog v. CVS Pharmacy, Inc.*, No. CV 20-337 WES, 2022 WL 1473707, at *5 (D.R.I. May 10, 2022), the court held plaintiff stated a claim under Section 1557 on a proxy discrimination theory where she alleged CVS placed limitations and restrictions on the filling of large opioid prescriptions. Just as HIV medications are “almost exclusively” prescribed to individuals living

with HIV, the plaintiff in *Fuog* alleged that large opioid prescriptions are "almost exclusively" needed by disabled individuals. So too here, CVS's limitations and restrictions on Plaintiffs' ability to receive their HIV medications and related pharmacy services—by designating all HIV medications as specialty medications and therefore subject to the Program—states a claim for proxy discrimination based on HIV status, because "a sufficient fit exists to draw the discriminatory inference." *Id.*

Questions about the closeness of the fit of the Program "is a fact-sensitive determination that will require reliable expert testimony," and thus is not suitable for resolution at this stage. *Id.* That HIV medications are not the only "specialty medications" does not factor into this analysis such that Defendants' rejoinder (Motion at 15) that specialty medications treat conditions other than HIV is irrelevant. The alleged proxy is not that all specialty medications are subject to the Program, but that all HIV medications are subject to restrictions under the Program. Because the Program denies Plaintiffs meaningful access to their prescription drug benefit, it is discriminatory. Because the receipt of HIV medications is "almost exclusively [an] indicator[] of membership in the disfavored group" of being diagnosed with HIV, Plaintiffs have adequately alleged CVS is engaging in proxy discrimination. *See Pac. Shores Properties, LLC*, 730 F.3d at 1160 n.23.

III. Defendants' Argument That None of the Plaintiffs May Assert Claims for Restitution Under the UCL Is Both Legally and Factually Wrong

As long as the Plaintiffs are entitled to some form of relief under the UCL, they can proceed on the claims they assert. *Estakhrian v. Obenstine*, 233 F. Supp. 3d 824, 846 (C.D. Cal. 2017) ("plaintiffs may seek injunctive *and/or* restitutionary equitable relief separate and apart from the same underlying claims"); *Luong v. Subaru of Am., Inc.*, No. 17-cv-03160-YGR, 2018 WL 2047646, *7 (N.D. Cal. May 2, 2018) (finding "those decisions allowing for claims for equitable relief to proceed as an alternative remedy, at the pleading stage, to be more persuasive based on the broad remedial purposes of the California consumer protection statutes."). As Defendants' newest motion on the UCL only challenges a remedy, not the entire cause of action, it is not properly the subject of a motion to dismiss. *Kanfer v. Pharmacare US, Inc.*, 142 F. Supp. 3d 1091, 1107 (S.D. Cal. 2015); *see also Finelite, Inc. v. Ledalite Architectural Prods.*, No. C-10-1276 MMC, 2010 WL 3385027, at *2 (N.D. Cal. Aug. 26, 2010) ("As the California Supreme Court

has more recently explained [ ] 'the right to seek injunctive relief under section 17200 is not dependent on the right to seek restitution; *the two are wholly independent remedies*.'"). A plaintiff may "allege claims in the alternative at the pleading stage. The equitable remedies afforded by the UCL and CLRA are expressly stated to be in addition to other available remedies at law." *Jeong v. Nexo Fin. LLC*, No. 21-CV-02392-BLF, 2022 WL 174236 (N.D. Cal. Jan. 19, 2022) (internal quotations omitted).

Second, as Defendants did not make this argument in the original motion to dismiss even though they could have (*see* Motion at 86–4), they have waived this argument. *See* Fed. R. Civ. Proc. 12(g)(2) ("Limitation on Further Motions. Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion."). While in ruling on the last round of CVS's motions the Court denied such motions without prejudice, it did not grant Defendants leave to renew a motion that was previously barred under Rule 12(g)(2).

Third, Plaintiffs can obtain monetary relief under the UCL in the form of both restitution and restitutionary disgorgement. Plaintiffs allege they are entitled to equitable relief in both forms: they have paid more money because of the Program, and the Defendants profited from acts of unfair competition. TAC, ¶¶ 3–4, 9, 26, 35, 88, 225–26. For example, John Doe One alleged that he paid Defendants for his HIV medications as a result of being forced to enroll in the Program. *Id.* at ¶ 26. John Doe Seven alleges that he was forced to pay $700 more to Defendants than was previously required before being subject to the Program. *Id.* at ¶ 88. These allegations form a basis for seeking restitution under the UCL: "A restitution order against a defendant thus requires both that money or property have been lost by a plaintiff, on the one hand, and that it have been acquired by a defendant, on the other." *Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 336 (2011).

Finally, Plaintiffs are not seeking non-restitutionary disgorgement. As the California Court of Appeal has explained, restitutionary disgorgement of profits unlawfully made and retained as a result of an act of unfair competition, including interest made on monies Defendants unlawfully retained, is an appropriate remedy under the UCL: "The purpose of such orders is to deter future violations of the unfair trade practice statute and to foreclose retention by the violator of its ill-

gotten gains. . . . Ordinarily, the measure of restitution is the amount of enrichment received … , but as stated in Comment e, if the loss suffered differs from the amount of benefit received, the measure of restitution may be more or less than the loss suffered or more or less than the enrichment." *Juarez v. Arcadia Fin., Ltd.*, 152 Cal. App. 4th 889, 913–15 (2007) (internal citations and quotation marks omitted).

Because Defendants cannot challenge that both restitution and restitutionary disgorgement are remedies Plaintiffs can seek and obtain from Defendants under the UCL, the Court cannot dismiss these particular remedies from the UCL cause of action. *Matoff v. Brinker Rest. Corp.*, 439 F. Supp. 2d 1035, 1038–39 (C.D. Cal. 2006) (denying motion to dismiss claims under UCL because plaintiffs alleged how they were entitled to restitutionary disgorgement and thus ". . . Defendant has not demonstrated that Plaintiff's claim under California's Unfair Competition Law fails to state a claim upon which relief can be granted," and clarifying that plaintiffs were not seeking non-restitutionary disgorgement).

IV. John Doe One's, John Doe Six's, and John Doe Seven's Claims for Declaratory Relief and Injunctive Relief Present an Actual Case and Controversy

Though CVS groups together John Does One, Two, and Six to argue that their "claims for injunctive relief . . . under both the ACA and UCL are moot" (Motion at 16), an analysis of each Plaintiff's allegations demonstrates that John Does One, Six, and Seven adequately plead claims for injunctive relief. John Doe Six's current and ongoing experience with CVS's failure to provide accurate and timely information concerning his rights to obtain his HIV medications (TAC, ¶¶ 70–71; *see also* Declaration of John Doe Six ("John Doe Six Decl."), ¶¶ 4–14, 18) is an adequate basis for a claim for injunctive relief under the ACA. As to John Doe Seven, CVS appears to concede that the TAC sufficiently alleges he has standing to seek an injunction, as CVS makes no argument to the contrary. *See* Motion at 21 (failing to raise arguments to the contrary; only contending that his "claims were not authorized"). Only CVS's challenge to John Doe Six's standing for injunctive relief is brought pursuant to Federal Rule of Civil Procedure 12(b)(1).

"To establish standing to sue, a plaintiff must show: (1) an injury that is concrete and particularized and actual or imminent; (2) a causal connection between the injury and defendant's challenged action; and (3) redressability." *Updike*, 870 F.3d at 947. "These three elements are

referred to as, respectively, injury-in-fact, causation, and redressability." Dkt. No. 203 at 3. Standing for injunctive relief only requires that Plaintiffs "show a real and immediate threat of repeated injury." *Updike*, 870 F.3d at 947 (internal quotations omitted). Courts must "take a broad view of constitutional standing in civil rights cases, especially where" as here "private enforcement suits are the primary method of obtaining compliance with the Act." *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1039 (9th Cir. 2008) (internal quotation marks omitted). CVS concedes both John Does Six and Seven adequately allege facts establishing standing for Article III purposes, as they fail to raise such arguments in their Motion. In addition, CVS does not challenge Plaintiffs' claims for declaratory relief (TAC, ¶ 205; Prayer for Relief, ¶ 8).

Injury-in-fact. John Doe Six and John Doe Seven have adequately alleged injury-in-fact, as their factual allegations (TAC, ¶¶ 9, 11, 12, 21–31, 57–68, 76–95) do not differ substantively from those of John Doe One and John Doe Two, whom the Ninth Circuit held adequately alleged a Section 1557 claim. *CVS Pharmacy, Inc.*, 982 F.3d at 1211–12.

Causation. John Doe One, John Doe Six, and John Doe Seven adequately allege that their injury is traceable to Defendants (TAC, ¶¶ 9, 11, 12, 21–31, 57, 59, 89–91), which CVS does not meaningfully contest. CVS's timeworn and merits-based argument that it does not "control the benefits designs offered" (Motion at 12), and that it "lacks authority to allow [members] to opt-out" (*id.* at 13), does not defeat Plaintiffs' alleged facts establishing standing, which are accepted for purposes of this Motion. *Sanders*, 749 F.2d at 481; *see also*, *supra*, n.12. Plaintiffs' well-pled allegations that Defendants "effectively control[] and direct[] the pharmacy benefits of [contracted] plans" (TAC, ¶ 2) are sufficient to establish "a causal connection between the injury and defendant's challenged action." *See also id.*, ¶ 162 (alleging facts that directly contradict CVS's improper assertions that they lack authority to "change the Program to permit opt out requests or exclude HIV Medications from the Program altogether"). While CVS has at various times raised arguments based on corporate separateness, the Court has already rejected such arguments when raised in the context of a motion to dismiss. *See* Dkt. No. 194 at 15 ("[t]o ignore the overall interrelationship among the entities which, in the case at bar, design and implement the allegedly discriminatory program and permit the CVS interrelated entities to escape responsibility

1 would exalt form over substance and impair the effectiveness of the anti-discrimination provision
2 of the ACA."). Defendants did not move under Civil L. R. 7-9 for leave to file a motion for
3 reconsideration of this Court's previous ruling on this point, and thus cannot properly raise this
4 argument as part of this Motion.

5 Redressability. Plaintiffs seek a number of remedies that will redress their injuries. First,
6 Plaintiffs seek a declaration that CVS engaged in disability discrimination in violation of Section
7 1557 of the ACA by designing and administering the Program. A declaratory judgment will send
8 "a message not only to the parties but also to the public and [would have] significant educational
9 and lasting importance." *Bilbrey v. Brown,* 738 F.2d 1462, 1471 (9th Cir. 1984). "The existence
10 of other remedies does not preclude appropriate declaratory relief." *Greater L.A. Council on*
11 *Deafness v. Zolin,* 812 F.2d 1103, 1112 (9th Cir. 1987) (citing Fed. R. Civ. P. 57). When it comes
12 to civil rights statutes, such declaratory relief is critical as it "may even forestall future litigation."
13 *Id.* at 1113. Declaratory relief is proper "(1) when the judgment will serve a useful purpose in
14 clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief
15 from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Bilbrey*, 738 F.2d
16 at 1470. CVS's merits argument throughout this litigation has been that other entities—namely,
17 its employer clients—control the health plans adopting the Program, and that CVS is just
18 complying with its contractual duties to implement and administer a prescription drug benefit and
19 thus cannot be liable for any violations of Section 1557. *See*, *e.g.*, Transcript at 42:5–43:9; 65:10–
20 17. A clear, unequivocal statement of rights by the Court that CVS cannot hide behind their own
21 contracts when it comes to complying with Section 1557 (*supra*, n.12) will help ensure that CVS
22 and others follow the law.

23 Second, Plaintiffs state a claim in the TAC, ¶¶ 12, 72–96, for a permanent, forward-looking
24 injunction against CVS prohibiting it from administering the Program, or in the alternative,
25 providing individuals receiving prescription drugs from CVS the right to opt out of the Program,
26 so long as CVS remains a "health program or activity" pursuant to Section 1557. *See EEOC v.*
27 *Goodyear Aerospace Corp.*, 813 F.2d 1539, 1544 (9th Cir. 1987) ("Generally, a person subject to
28 [] discrimination is entitled to an injunction against future discrimination").

Third, John Doe Six's experience with CVS's failure to provide accurate and timely notice epitomizes the need for the Court to order corrective notice regarding the status of the Program. The Court has broad discretion to require class-wide notice as appropriate, including as part of fashioning equitable relief. *See* Fed. R. Civ. P. 23(c)(2)(A); *see also Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 986 (9th Cir. 1994) ("The district court has broad latitude in fashioning equitable relief when necessary to remedy an established wrong"); *Elkins v. Dreyfus*, No. 10-cv-01366-MJP, 2011 WL 3438666, at *12 (W.D. Wash. Aug. 5, 2011) (class-wide notice ordered as part of permanent injunctive relief); *Consumers Union v. Alta-Dena Certified Dairy*, 4 Cal. App. 4th 963, 967 (1992) (corrective notice appropriate remedy under the UCL). As alleged in the TAC at ¶¶ 56–57, John Doe Six first sought an accommodation under the Program in 2014. CVS claims, however, that his Cisco-provided prescription drug plan administered by CVS was changed in 2021 to remove the discriminatory Program, *but John Doe Six was never given notice of this change.* John Doe Six Decl., ¶¶ 4–5, 18. As such, he continued to obtain his HIV medications for over a year and a half as if they were subject to the limitations under the Program. John Doe Six learned of the change only when CVS filed its fourth motion to dismiss on April 24, 2023. Incredibly, shortly after those statements from CVS to this Court, John Doe Six received a notice from CVS stating, yet again, that John Doe Six was required to obtain his HIV medication under the discriminatory terms of the Program. CVS conveniently avers this notice was made "due to an error in Caremark's automatic notification system." Motion at 19. CVS is free at the merits stage to raise this argument, but the errant notice actually makes the point that clear and accurate notice is a meaningful remedy. If CVS cannot get it right as to John Doe Six when litigation has shined a spotlight on its conduct, other similarly situated individuals have no chance to learn the truth.

Fourth, putative class members require an order directing CVS to reprocess past claims for coverage under their health plans with the discriminatory terms of the Program excised. Members of the class have suffered injury as a result of CVS's administration of the Program, as they must sometimes purchase medication at retail pharmacies that, but for the Program, would otherwise be in their health plan's network, but due to the Program those purchases are not considered a "covered expense," resulting in Class Members spending thousands of dollars out of pocket. TAC,

¶¶ 1, 97, 98, 103, 215. Like John Does One and Seven, other Class members incurred out of pocket losses when CVS failed to provide documentation necessary for ADAP and other financial support. *Id.*, ¶¶ 26, 88. The Class is entitled to equitable relief aimed at making them whole. *See, e.g.*, *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (Title VII equitable relief is aimed at a "make whole" remedy including for injuries suffered as a result of past discrimination); *Caudle v. Bristow Optical Co.*, 224 F.3d 1014, 1020 (9th Cir. 2000) (same). Retrospective equitable relief is both common and appropriate in civil rights class actions seeking redress for past discrimination. *See*, *e.g.*, *Bowen v. City of New York*, 476 U.S. 467, 476 (1986) (affirming order requiring a defendant to "reopen the decisions denying or terminating benefits and to redetermine eligibility").

V. The Addition of John Doe Seven Is Consistent with the Court's Order and Serves the Interests of Efficiency and Judicial Economy

Defendants contend that the Court did not authorize John Doe Seven to be added as a Plaintiff. The Court's order granting Plaintiffs' motion to amend, however, did not place any limit on additional Plaintiffs with standing to seek injunctive relief. *See* Dkt. No. 230. A motion to amend should be resolved "with all inferences in favor of granting the motion," *Griggs v. Pave Am. Grp.*, 170 F.3d 877, 880 (9th Cir. 1999), and the Court granted Plaintiffs leave to amend in order to address Defendants' arguments that the then-existing Plaintiffs lacked standing to seek prospective injunctive relief to remedy the discriminatory impact of the Program. Dkt. No. 230 at 2, 6. The Court recognized that there were contested facts regarding whether John Doe Six was subject to the challenged Program and rejected Defendants' futility argument based on these contested facts. *Id*. at 6. As discussed in Section IV, those facts continue to be contested. Since John Doe Seven' HIV medication is undisputedly subject to the Program, and since the purpose of the Court's order granting leave to add John Doe Six was to permit Plaintiffs the opportunity to add a Plaintiff with standing to seek injunctive relief, the addition of John Doe Seven is consistent with the Court's order. Adding John Doe Seven now, rather filing a subsequent motion to amend if the Court determines that John Doe Six lacks standing, or filing a new action and moving to consolidate it with this one, also serves the interests of efficiency and judicial economy.

Defendants cite *Long v. Ingenio* for the proposition that they would be prejudiced by "starting over with a new plaintiff in a case of this vintage." No. 10-cv-05761-RS, 2015 WL 4760377, at *5 (N.D. Cal. 2015). *Long*, however, is inapposite, as the court there denied leave to amend after the plaintiff lost summary judgment. *Id.* at 1, 2. Here, the addition of John Doe Seven puts the proceedings exactly where the Court contemplated they would be in its Order granting leave and entails no "starting over." *See, e.g.*, *Bronson v. Samsung Elecs. Am., Inc.*, 2019 WL 174526, at *3 (N.D. Cal. 2019) ("[D]efendants argue the motion for leave to amend should not be utilized as a vehicle for a different plaintiff to pursue an entirely new claim. These arguments are unavailing. Both plaintiffs purchased a television that proved defective because of colored lines and when they called an authorized repair facility were told the parts were unavailable. The intervention and amendment of plaintiff Hardin therefore will neither 'greatly alter[ ] the nature of the litigation' nor 'require[ ] defendants to . . . undertake[ ], at a late hour, an entirely new course of defense.'"); *MacRae v. HCR Manor Care Servs.*, LLC, No. 14-0715-DOC (RNBx), 2018 WL 10164063, at *4 (C.D. Cal. Mar. 5, 2018) (similar) (collecting cases). Accordingly, there is no prejudice to Defendants from the addition of John Doe Seven.

VI. CONCLUSION

As demonstrated above, Defendants' fifth motion to dismiss is largely a rehash of arguments raised in its fourth motion to dismiss and the hearing on that motion. It is time to tell CVS to move on. The Court should reject these arguments and direct Defendants to file an Answer to the TAC.

Dated: November 14, 2023

Respectfully submitted,

/s/ Jerry Flanagan

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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2023, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the email addresses denoted on the attached Electronic Mail Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on November 14, 2023.

/s/ Jerry Flanagan

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